Nos. 82-354, 82-35[illegible] and 82-398

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.* and CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION and UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.* and NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AUTOMOBILE OWNERS ACTION COUNCIL AND EUGENE J. MEYUNG

Of Counsel:
LOWELL R. BECK, President
and
PAUL C. BLUME, Vice President
& General Counsel
National Association of
Independent Insurers

DONALD L. SCHAFFER, Senior
Vice President, Secretary
& General Counsel
Allstate Insurance Companies

RAYMOND J. RASENBERGER*
LAWRENCE C. MERTHAN
FRANK J. COSTELLO
RICHARD M. HALL
ZUCKERT, SCOUTT, RASENBERGER
& DELANEY
888 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 298-8660

Counsel for Respondents
National Association of
Independent Insurers,
Automobile Owners
Action Council,
and Eugene J. Meyung

**Counsel of Record*

October 8, 1982

QUESTION PRESENTED

Whether in light of all the facts and circumstances it was arbitrary and capricious and contrary to law for the National Highway Traffic Safety Administration to decide that a particular type of passive seatbelt proposed to be used by certain manufacturers would be too ineffective to warrant its use and that accordingly the entire passive retraint safety standard, covering air bags and other types of seatbelts of proven effectiveness, should be rescinded?

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Respondents, National Association of Independent Insurers, Automobile Owners Action Council and Eugene J. Meyung (collectively referred to as "NAII"),[1] respectfully request that the petitions for a writ of certiorari be denied.

[1] NAII is a trade association of independent casualty insurers that together write approximately forty percent of all automobile casualty insurance in the United States. The members of NAII are identified in the

(footnote continues)

STATEMENT

The long history of this matter is well summarized in the court of appeals opinion. NAII would respectfully direct the Court's attention to the following points:

—The National Highway Traffic Safety Administration ("NHTSA") concluded that: (1) the type of passive seatbelts which certain manufacturers said they would install would be ineffective because once detached they would be equivalent to manual seatbelts; and (2) because those manufacturers said they would design and install such belts, all passive restraint requirements, including restraints of proven effectiveness, should be abandoned. In other words, NHTSA allowed the industry being regulated to select a system of "compliance" which that industry alleged would not achieve the statutory goals of saving lives and preventing injuries; it then totally excused the industry from compliance despite the existence of other systems that clearly would meet such goals.

—The court of appeals concluded that: (1) NHTSA's finding that the proposed belts would not increase usage significantly (a) was supported by *no evidence whatsoever*, (b) was contrary to evidence that showed major increases in usage whenever automatic belts have been installed, and (c) was contrary to other evidence which showed that the primary reason most people fail to use manual seatbelts is not because they are hostile to belts but because of laziness, forgetfulness or inconvenience, all of which would be obviated by the proposed belts; and (2) before abandoning the entire passive restraint standard on the basis of belts it found to be ineffective, NHTSA had an obligation under the Safety Act[2] at least to consider alternatives less drastic in terms of their safety consequences.

(footnote continued)

appendix to this brief. The Automobile Owners Action Council is a non-profit corporation dedicated to furthering the interests of automobile owners and drivers in safety.

[2] The National Traffic and Motor Vehicle Safety Act of 1966, as amended, 15 U.S.C. 1381 *et. seq.* (the "Safety Act").

—The Safety Act places an affirmative duty on NHTSA to avoid deaths and injuries to vehicle occupants arising from second collisions, *i.e.*, "to assure that when the car stops dead, the passengers don't." The Act makes safety "the overriding consideration in the issuance of standards" and calls upon the agency to force the development of new technology where necessary to do so. *See, Chrysler Corporation v. Department of Transportation,* 472 F.2d 659, 671-73 (6th Cir. 1972); *Pacific Legal Foundation v. Department of Transportation,* 593 F.2d 1338, 1340, 1344 (D.C. Cir.), *cert. denied* 444 U.S. 830 (1979). While economic considerations may be relevant to the question of whether a particular standard is "practicable," the perceived economic hardship of automobile manufacturers is not a relevant consideration except for very small companies which may be exempted on such grounds. *See* 15 U.S.C. 1410(d)(1). In any event, considering the relatively low cost of passive restraints, compliance with the passive restraint requirements was not a major economic obstacle facing the automobile manufacturing industry.

—The passive restraint standard is by far the most important safety standard promulgated by NHTSA for the protection of vehicle occupants.[3] This year approximately 25,000 vehicle front seat occupants will die and another 3 million will be injured in accidents. Only 10-11 percent of vehicle occupants will be protected by seatbelts. Each one percentage point increase in seatbelt usage will save 172 lives and prevent over 2,000 serious injuries. As the shift to smaller cars continues, the risk of death or injury increases, and even NHTSA acknowledges that absent passive restraints, the growing number of small cars will cause an additional 7,000 deaths annually by 1990. (Pet. App. 14a).

[3] Of the fifty motor vehicle safety standards promulgated by NHTSA, 49 C.F.R. § 571, the only one that directly addresses the second collision problem is Standard 208, *i.e.*, other standards in the 200 series (such as padded dash requirements) at most are intended to mitigate the effects of, rather than to prevent, the second collision.

—Passive seatbelts would add approximately $74 to the selling price of a new car, plus $15 of added fuel costs over the life of the car. (Pet. App. 16a). Insurance savings alone would offset some or all of this cost.[4]

—Congress has repeatedly refused to terminate the passive restraint standard despite claims of economic hardship by the auto industry. But NHTSA's rescission order appears to have had its origins on exactly those grounds. As the court of appeals observed after reviewing the record: "it is difficult to avoid the conclusion that NHTSA's analysis in Notice 25 has been distorted by solicitude for the economically depressed automobile industry—which is not the agency's mandate—at the expense of consideration of traffic safety, which is" (Pet. App. 70a (footnotes omitted)).[5]

—With the rescission of the passive restraint requirements in Standard 208, manufacturers are free to comply with that standard solely through the use of the manual belt systems first required in 1967 and found to be largely ineffective as early as 1969. (Pet. App. 6a).[6] Moreover, all of the affidavits submitted by the manufacturers to the court of appeals indicated that absent a requirement for

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[4] Auto sales normally amount to approximately ten million cars per year. At $89 per car, passive belts would therefore cost $890 million. Insurance savings are estimated by NHTSA at $4.3 billion if usage rates increased to 60 percent. (Pet. App. 15a).

[5] The court noted that the reasons initially given by the Secretary of Transportation for promulgating new rulemaking on passive restraints, one month after taking office, were related to economic conditions in the auto industry; and that NHTSA's action two months later delaying the effectiveness of Standard 208 and starting a rulemaking to consider rescission was announced by the White House as part of a package of economic recovery measures. (Pet. App. 13a, 71a). When the rescission order was finally adopted, NHTSA Administrator Peck acknowledged that it was contrary to the views of all of his staff. (Pet. App. 71a, n. 44).

[6] Apart from the low usage rate associated with manual belts, such belts do not have to meet the crashworthiness requirements of Standard 208. In other words, in rescinding the performance standards for passive restraints, NHTSA rescinded the *only* crashworthiness standards that applied to seatbelts, manual or automatic.

passive restraints, they will not be voluntarily introduced in the United States (except to the extent that limited passive belt systems have been made available in the past).[7]

REASONS FOR DENYING THE PETITIONS

I. Summary.

Petitioners acknowledge that the basic question before the Court is whether NHTSA acted arbitrarily and capriciously or not in accordance with law; and that this, in turn, is a question of whether the agency engaged in reasoned decisionmaking and reached a result that is rational and not clearly erroneous. Petitioners' quarrel is not with this standard but with the application of it to the facts and circumstances of this case.

The court of appeals did no more than it was required to do. It looked carefully at the record and at the purposes of the Safety Act both as written and subsequently considered by NHTSA, itself, and by Congress. No single factor was viewed as decisive, but looking at the entire record and the history of the standard the court of appeals was unable to find that the agency had acted rationally and in accordance with law in abolishing the entire passive restraint safety standard for the reasons it gave. The opinion of the court of appeals was not one that might have changed with a slightly different weighing of the factors or with more than the substantial deference it gave the agency decision. The agency's decision was, as Judge Edwards put it in his concurring opinion, "nothing more than a determined effort to achieve a particular result without regard to the facts at hand." (Pet. App. 75a-76a).

If the Court grants the petitions, it will not be called upon to decide significant questions as to the standard or scope of judicial review when a regulation is rescinded. Its task will be

[7] At least one manufacturer, Mercedes, offers an airbag system (driver-side only) in Europe but not for export to the United States. In affidavits submitted to the court of appeals, most major manufacturers have sworn that their passive restraint programs were dismantled shortly after the rescission order was issued.

the same as that performed by the court of appeals, a searching inquiry into a voluminous record to determine whether this particular agency action was arbitrary and capricious and not in accordance with law. Additionally, public interest considerations suggest against further review. There is a continuing and active Congressional interest in passive restraints—and the Congress is the ultimate forum where the decision to follow or to abandon the goals of the Safety Act should be made.

II. No Important Question Of Federal Law Is Presented.

Most of the questions presented for review by petitioners are not genuine questions for determination by the Court. The court of appeals did not adopt any novel theories on the standard of judicial review. It decided *this* case on *its* facts. While it discussed at some length the scope of its review of agency action in the circumstances presented, its opinion broke no new ground. The standard of review it observed was "whether the agency has engaged in reasoned decisionmaking, making actual judgments concerning the significance of the evidence in the record and supporting its decision with 'reasoned analysis'." (Pet. App. 48a-49a). This is, essentially, the typical *Overton Park* formulation and is not challenged by petitioners. It is a deferential standard consistent with the Court's long-standing precedents in the area of informal rulemaking.[8]

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[8] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *see also, Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 662-63 (1980) (Burger, C.J., concurring); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 803 (1978); *Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 285 (1974). *Cf. American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 522-523 (1981) (similar standard applied under statutory substantial evidence test). It is also consistent with the highly deferential standard of review applied in other cases by Judges Mikva and Edwards, the authors of the majority and concurring opinions below. See *WJG Telephone Company, Inc. v. Federal Communications Commission*, 675 F.2d 386, 388-89 (D.C. Cir. 1982) (upholding FCC action based on estimate as long as FCC did not "pluck a number out of thin air"); *Connecticut Light and Power Company v. Nuclear Regulatory Commission*, 673 F.2d 525, 535 (D.C. Cir. 1982)

(footnote continues)

The questions presented by petitioners are curiously silent about the voluminous record which the court of appeals analyzed and the critical importance of what was in that record —and *not* in it—to the court of appeals decision. Instead, petitioners for the most part seek to have the Court address the correctness of selected pieces of verbiage from the court of appeals opinion or other abstract propositions of law on which the court's decision did not hinge. NAII's analysis of each of petitioners' "questions presented" is as follows:

A. ***Whether there is a different standard of review for rescission than initial promulgation; and whether an agency may reasonably rescind a regulation where it finds that "changed circumstances" create "substantial uncertainty" that the regulation will be effective.*** (Department of Transportation Questions 1 and 2;[9] Motor Vehicle Manufacturers' Questions 2 and 3; Consumer Alert/Pacific Legal Foundation Question 1).

The court of appeals did not hold that, as a matter of law, there is a greater burden on an agency to support rescission of a regulation than to support a refusal to promulgate in the first instance. It did not hold that an agency may not change its mind based on changed circumstances. It *did* hold that the decision to rescind a regulation, like the decision to promulgate

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(footnote continued)

(upholding NRC action although court had "to search dusty attic corners of the record to bring to light an adequate rationale for the Commission's action."); *Washington Association for Television and Children v. Federal Communications Commission*, 665 F.2d 1264, 1273 (D.C. Cir. 1981) (upholding FCC action although it "has by no means served as an exemplar of proper agency procedure in this case"); *WWHT, Inc. v. Federal Communications Commission*, 656 F.2d 807, 809, 816-17 (D.C. Cir. 1981) (narrow standard of review applied to agency refusal to institute rulemaking); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 655 F.2d 318, 331-32 (D.C. Cir. 1981) (substantial deference to EPA "expertise" as long as it gives "plausible reasons" for action).

[9] DOT Question 2 may also be intended to raise the more general question of whether, on the facts of this case, the court of appeals decided correctly. If so, that question is discussed in Part III below.

one must be rational in light of all relevant facts and circumstances.

In this case, as the court of appeals noted, NHTSA did not and could not rescind on the basis of a "clean slate." (Pet. App. 47a). A "clean slate," or something close to it, might well exist when an agency is dealing with the question of whether to issue a regulation. But the passive restraint standard had a dozen years of relevant history including both the repeated refusal of Congress to rescind the standard and the fact that it had survived judicial review (twice) and the legislative veto process (once). The technological feasibility and lifesaving potential of the standard had been proved in actual use during that time. Surely such history is relevant to the question of whether the agency's decision was arbitrary and capricious. The court of appeals gave appropriate weight to that unusually long and significant history, but in doing so it did not announce a new principal of judicial review.[10]

Petitioners cannot be asking the Court to hold that the repeated incantation of "uncertainty" by the agency is by itself sufficient to trigger total judicial deference. They must recognize that all predictions about future behavior involve a measure of uncertainty, and that an agency finding of uncertainty which serves as the basis for its decision, like any other key finding, must have a rational basis. The court of appeals held no more. It simply found that on the basis of the record, and allowing for the required judicial deference, it could discover no rational basis for a degree of uncertainty sufficient to support rescission. Bearing that in mind, and that the issue here is safety, not economic regulation, it is absurd to suggest, as the manufacturers do, that the court of appeals opinion has some-

[10] The manufacturers have mischaracterized the court of appeals opinion as "conceding" that the reasons given by NHTSA for rescission in 1981 "would have been upheld as a basis for not adopting the regulations in 1977." (Manufacturers' Petition, at 17). The court did not state that a non-rational claim of "uncertainty" can support a decision either to promulgate or rescind. Rather, the court noted, "[t]here must be *some* reason to support *any* reasoned decision" and "[t]here is not one iota of evidence to support NHTSA's conclusion." (Pet. App. 51a).

how fueled the fires of anti-deregulation litigation. (Manufacturers' Petition, at 18, n. 33 and 24-25, n. 49).[11]

B. ***Whether the court of appeals was in error in finding a "congressional mandate" in post-enactment legislative events.*** (Manufacturers' Question 1).

Petitioners contend that the court of appeals wrongfully relied on the post-1966 congressional action on passive restraints to divine a mandate that otherwise would not exist.

The court of appeals did not base its opinion on any such mandate. It *did* examine the extensive history of passive restraints to determine whether or not NHTSA's *own* interpretation of its mandate as requiring a passive restraint standard had been acquiesced in by Congress. In so doing, it recognized that "a consistent administrative interpretation, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval." (Pet. App. 47a, citing *Udall v. Tallman*, 380 U.S. 1, 17-18 (1965)). As the Court has recently noted, the deference owed to an agency's construction of a statute "is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any

[11] In actual fact, despite the publicity the opinion has received since its publication on June 1, 1982, we have found only five instances in which it has been cited by a federal court and not once has it in any way been a controlling precedent. Rather, it has been collaterally cited for the hornbook propositions that when an agency reverses a prior position it must be careful to explain its reasoning, *National Resources Defense Council, Inc. v. Gorsuch*, No. 81-2208 (D.C. Cir. August 17, 1982), slip. op. at 19, n. 41, *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 683 F.2d 752, 760 (3rd Cir. 1982), *National Association for the Advancement of Colored People v. Federal Communications Commission*, 682 F.2d 993, 998 (D.C. Cir. 1982), and that an agency must act consistently with its enabling legislation, *Ashton v. Pierce*, 541 F.Supp. 635, 638 (D.D.C. 1982). Perhaps most instructive is *I.L.G.W.U. v. Donovan*, Civil Action No. 81-2606 (D.D.C. July 23, 1982), mimeo. op. at 8, in which the district court (Oberdorfer, J.) correctly distinguished *State Farm* on the facts and upheld the rescission of a regulation by the Department of Labor (in factual circumstances substantially different from those presented herein).

misperception." *See, United States v. Rutherford*, 442 U.S. 544, 553, 554 and n. 10 (1979), and cases cited therein.

The court's conclusion was that these legislative developments necessarily affected NHTSA's burden of explanation, but *did not bar rescission on the basis of changed circumstances or any other rational basis.* In concluding its discussion of this matter the court stated: "This does not mean that NHTSA may not revoke the standard. If the agency clearly articulates a reasonable basis for that action, we must defer to the policy judgment and expertise of the agency." (Pet. App. 48a).

C. ***Whether the court of appeals may invalidate a regulation because of the agency's failure to consider alternatives not raised by its notice of rulemaking or foreclosed by the agency action.*** (Manufacturers' Question 4).

This question is not raised by the court of appeals opinion. The court of appeals did not require the agency to adopt any particular procedure or to deny procedural due process to anyone. The court's opinion focused on the substantive obligation of the agency under the Safety Act to consider alternatives less drastic than total rescission. The agency failed to undertake such consideration. As a consequence it failed to explore its procedural options as well. The court of appeals did no more than insist on the consideration of those options.

In any event, the agency was not procedurally trapped as the question suggests. Its most obvious alternative presented no possible procedural bar. Having found that the GM-type belt would function like a manual rather than passive seatbelt, NHTSA could simply have announced that the belt did not meet the standard. This was the kind of thing NHTSA knew how to do and had done before.[12] It involved no amendment of the standard; it required no rulemaking.

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[12] NHTSA did precisely this on May 4, 1971, when several manufacturers inquired as to whether a manual seatbelt with an interlock would meet the passive restraint requirements. NHTSA stated that "[t]he concept of an occupant protection system that requires 'no action by vehicle occupants' as

(footnote continues)

D. ***Whether the court of appeals exceeded the proper limits of judicial review by ordering the passive restraint requirement into effect on September 1, 1983.*** (Department of Transportation Question 3; Manufacturers' Question 5).

This is not a substantial question, for several reasons. First, the court of appeals did not pull the September 1, 1983 compliance date out of thin air—*it is the date set by NHTSA* for small car compliance. The only date "set" by the court was the stay of large and mid-size car compliance, otherwise set by NHTSA for September 1, 1982, for one year, an equitable action taken solely for the benefit of the petitioners and in recognition of the practical consequences of the court's decision. *Cf., Northern Pipeline Construction Co. v. Marathon Pipe Line Company and United States,* 50 U.S.L.W. 4892, 4902 (June 28, 1982).

Second, the court of appeals mandate is tentative, pending review of NHTSA's October 1, 1982 submission concerning the efficacy of that compliance date. Finally, as the court's order made clear, NHTSA continues to be "free to issue orders rescinding or modifying the passive restraint standard, subject to judicial review." (Pet. App. 82a (footnote omitted)).

III. The Case Was Correctly Decided By The Court Of Appeals.

The court of appeals set aside NHTSA's action because: (a) NHTSA's finding that the proposed seatbelts would not increase usage enough to justify the cost was not rational; and (b) if such a finding was rational, NHTSA was required by the Safety Act to consider less drastic means of dealing with the problem.

a. In taking up the first question the court of appeals had to determine whether NHTSA's conclusion that it could not reliably predict "even a 5 percentage point increase" in passive

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(footnote continued)

used in Standard 208 is intended to designate a system that requires no action other than would be required if the protective system were not present in the vehicle." 36 Fed. Reg. 8296 (May 4, 1971).

restraint usage was rational. The Court examined the basis for that decision and found the following:

1. There had been no usage experience with the particular GM-type belt that the agency said most manufacturers would use,[13] and there was no other evidence of any kind on which the agency could base the conclusion it reached.

2. The GM-type belt was substantially similar to other passive belt systems in that it deployed automatically and had an emergency release mechanism. (Pet. App. 18a-19a, n.12). Like other belts, it could be detached only through use of that mechanism. It differed from other belts only to the extent that when detached, it was less obtrusive than some other designs.[14]

3. There was substantial evidence in the record on actual usage rates for other passive seatbelt systems. Some 350,000 Volkswagen Rabbits were equipped with passive belts between 1975 and 1980. Approximately 8,000 1978 and 1979 GM Chevettes had such belts, as did 13,000 1980 Chevettes. The record showed the following usage rates for passive versus manual belts for these cars. (Pet. App. 19a, n.12).

	Manual	Passive
VW Rabbit.....	34%	84%
1978-1979 Chevette.....	34%	71%
1980 Chevette	31%	70%

[13] It is by no means clear that most manufacturers would use such belts, and NAII believes the record will not support the agency's conclusion in this regard. The court of appeals, while conceding the finding could be erroneous, nevertheless deferred to it. (Pet. App. 50a).

[14] Once detached by the emergency release mechanism, the GM-type belt can be pushed aside but remains loose and obtrusive. The VW Rabbit passive belt is similar in this respect. The passive belt used in the 1980 Chevette could be released by the emergency mechanism but the shoulder portion could not be pushed aside, *i.e.*, it was "continuous" in the language of the court of appeals.

This evidence was dismissed by the agency as of no probative value. The court examined in detail the agency's reasons for totally rejecting the evidence and concluded, in an analysis of each reason that speaks for itself, that "NHTSA's reasons for refusing to extrapolate from the available data are extremely weak." (Pet. App. 52a, n.30).[15]

4. The record also contained substantial survey evidence showing that, while a "hard core" of the population will not wear seatbelts under any circumstances, the reasons most people do not use manual belts are obviated by passive belts. This evidence showed that such factors as "bothersome, inconvenient, forgot," (68% of respondents in one survey) and "too much time/hassle" and "not in habit/don't think about it /lazy" (47% of respondents in another survey) were the principal reasons manual seatbelts were not being worn. (Pet. App. 59a, n. 33).

5. This brief summary does not do justice to the court of appeals painstaking review of NHTSA's murky order and the voluminous record. (The joint appendix consumed 2,562 pages.) Such a review led Judge Edwards to make the following statement: "the agency decision appears to be nothing more than a determined effort to achieve a particular result without regard to the facts at hand.

[15] NHTSA's reasons for refusing to give any weight to the data were: (1) the cars equipped with passive belts were purchased intentionally by those seeking such belts; (2) those purchasers were not representative of the general public, educationally or otherwise; (3) some of the belt systems had ignition interlocks; and (4) all the cars were small and belt usage tends to be higher in smaller cars. However, as the court of appeals pointed out, these reasons were undercut by other facts and by NHTSA's own statements. For example, Chevette purchasers were not shown to be atypical, and the record indicated that most people who bought passive restraint-equipped cars were not looking for passive restraints; and that 55 percent of them did not even know they were getting them. The record also showed that the 1980 Chevette with no ignition interlock generated a greater increase in usage than cars with the interlock. As for size, it is true that manual belt usage tends to be higher on smaller cars but that fact does not address, let alone explain, why passive belt systems dramatically increased the usage rates in even the smallest cars. Moreover, small cars are rapidly becoming the norm rather than the exception. *Id.*

Plainly, this is not reasoned decisionmaking, and it cannot be sanctioned by this court." (Pet. App. 75a-76a). Given the same analysis we believe the Court would reach the same conclusion.

b. The court of appeals then turned to the question of whether the agency had a duty to consider alternatives less drastic than total rescission. Was it necessary to throw out "the baby with the bath water?" The court found that the agency had devoted not even "a modicum of reasoned analysis" to several obvious alternatives, the most apparent of which was to exclude seatbelts which do not function as passive restraints from the passive restraint standard. The court of appeals went on to identify other obvious alternatives, such as airbags,[16] which were not examined by the agency. The court of appeals did not mandate any alternative. It simply found that the Safety Act required *some* reasoned consideration of *some* alternative to total rescission.

Petitioners are critical of the court of appeals failure to accord adequate judicial deference to NHTSA. However, deference must first be accorded to the statute, especially one concerned with saving lives and avoiding injuries. Given the thrust of the Safety Act, any court would be concerned when an agency finds that a $74 increase in the purchase price of a car—an amount which could be more than offset by savings in insurance costs[17]—is too much to spend to save thousands of lives and to prevent tens of thousands of serious injuries.

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[16] Airbags are the "state of the art" passive restraint. NHTSA did not discuss airbags in its order because it found that the manufacturers did not intend to use them as a means of meeting the standard. (Pet. App. 96a). It did not even consider whether airbag use by manufacturers would increase if it declared that GM-type belts did not meet the standard. In addition, a few manufacturers, *e.g.*, Mercedes and BMW, indicated that they would rely on airbag systems to some extent to meet the passive restraint requirement (and only if there were such a requirement). It is the belief of NAII that in such case airbag results would be so compelling that the use of such systems by manufacturers would increase dramatically.

[17] NHTSA's own studies showed insurance savings of $4.3 billion annually, based on a 60 percent usage rate. (Pet. App. 15a).

NHTSA's Regulatory Impact Analysis indicated that an increase in seatbelt usage of thirteen percentage points (from 11% to 24%) would be needed to achieve the cost-benefit "break even" point. (Pet. App. 17a).[18] That represents 2,236 lives saved and over 26,000 serious injuries avoided in one year. And NHTSA itself acknowledged that, even with GM-type belts, a 10 percentage point increase was possible,[19] *i.e.*, 1,720 lives and 20,000 serious injuries. Such safety benefits are far more significant than were those at stake in *American Textile, supra.* The concern of the Court about giving effect to a safety statute in that case was not unlike the concern reflected by the court of appeals in this case.

IV. Further Review Would Not Be In The Public Interest.

Riding in an automobile is a high-risk environment. Far more Americans are exposed to that risk than work in textile mills or benzene plants. People are dying today and suffering needless serious injuries in substantial numbers because a passive restraint standard is not in effect. Those who want passive restraints in their cars, either for their own protection or to protect other members of their family, are not free to choose them. There is little choice of cars with passive belts (no American cars) and no cars are available with airbags.

It is no answer to say, as does Pacific Legal Foundation in its petition (p. 7), that people who care can purchase cars with automatic belts or "buckle the seatbelts they have now." And that is certainly not the answer Congress has given.

If the petitions are granted, it is certain that the petitioners will then seek a further stay, attempting to place the Court's busy calendar between automobile passengers and passive restraints. Even if that stay is eventually dissolved, and it most certainly would be, "the goals of the federal motor vehicle

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[18] It should be emphasized that neither NHTSA nor the court of appeals believed that a strict cost-benefit analysis was appropriate. (Pet. App. 17a, n. 10). *Cf., American Textile, supra.*

[19] "Based on the data available to it, NHTSA is unable to assess the probability that the actual incremental usage would fall nearer a 0 percentage point increase *or nearer some higher value like a 5 to 10 percentage point increase.*" (Pet. App. 104a). (Emphasis added.)

safety program will have been dealt a serious setback." *Coleman, Secretary of Transportation v. PACCAR, Inc.*, 424 U.S. 1301, 1307-08 (1978) (Rehnquist, J., in chambers, vacating stay of motor vehicle standard entered by Ninth Circuit). It may seem premature to be arguing against a stay motion that has yet to be filed (although the petitions themselves appear to be arguing in support of such a motion), but given the history of this matter, and given the fact that any delay translates directly into deaths and serious injuries, it is caution bred by experience.[20]

At the same time, it is precisely the public interest implications of this matter, and the history of active Congressional interest, which give reason to believe that the decision to follow or to abandon the goals of the Safety Act will in due course be made in the forum where it should be made—the Congress.

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[20] This delaying process has already begun. Responding to the court of appeals on October 1, 1982, NHTSA stated its belief that the September 1, 1983 compliance date was not achievable. As to how it should proceed in the interim, NHTSA gave the following alternate courses: "[i]f the Supreme Court denies the Petition for a Writ of Certiorari filed by the Secretary, it will be time enough then for NHTSA to promptly conduct a rulemaking to consider new evidence from the manufacturers and other interested parties, and to provide a new effective date for Modified Standard 208;" or "[i]f the Petition for a Writ of Certiorari is granted there would be at that time compelling grounds for a stay of this Court's June 1st and August 4th orders." D.C. Cir. Nos. 81-2220 and 81-2721, NHTSA's Memorandum In Response To The Court's August 4, 1982 Order, at 10 (October 1, 1982). The one course that NHTSA steadfastly refuses to consider is the most obvious one: enforcement of the Safety Act's mandate by requiring passive restraints.

CONCLUSION

The opinion of the court of appeals is an opinion that likely would have been issued by any panel of any court of appeals in the nation. It did not make new law. It did not make bad law. The petitions for a writ of certiorari should be denied.

Respectfully submitted,

RAYMOND J. RASENBERGER*
LAWRENCE C. MERTHAN
FRANK J. COSTELLO
RICHARD M. HALL
ZUCKERT, SCOUTT, RASENBERGER & DELANEY
888 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 298-8660

Counsel for Respondents
National Association of Independent Insurers, Automobile Owners Action Council, and Eugene J. Meyung

**Counsel of Record*

Of Counsel:
LOWELL R. BECK, President and
PAUL C. BLUME, Vice President & General Counsel
National Association of Independent Insurers

DONALD L. SCHAFFER, Senior Vice President, Secretary & General Counsel
Allstate Insurance Companies

October 8, 1982

The member companies of the National Association of Independent Insurers are the following:

Acceptance Insurance Company
Admiral Insurance Company
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Agsecurity Insurance Company
Agway Insurance Company
Alabama Farm Bureau Mut. Cas. Ins. Co.
Alabama Farm Bur. Mut. Ins. Service, Inc.
Alexander Hamilton Ins. Co. of America
Allied Fidelity Insurance Company
Allstate Indemnity Company
Allstate Insurance Company
Alpha Property & Casualty Ins. Co.
American Agricultural Ins. Co.
American Bankers Ins. Co. of Florida
American Bonding Company
American Centennial Ins. Co.
American Colonial Insurance Company
American Colonial Insurance Co. Inc.
American Consumer Insurance Company
American Crusader Ins. Co., Ltd.
American Continental Insurance Company
American Excess Insurance Company
American Family Home Insurance Company
American Family Mutual Insurance Company
American Farmers Mutual Casualty Company
American Fidelity Fire Ins. Co.
American Fidelity Insurance Company
American Guarantee & Liability Ins. Co.
American Liberty Insurance Company
American Modern Home Insurance Company
American Mutual Reinsurance Company
American National Gen. Ins. Co.
American National Property & Casualty Co.
American Re-Insurance Company
American Risk Assurance Company
American Service Mutual Insurance Co.
American Southern Insurance Company
American Specialty Insurance Company
American Universal Insurance Company
American Western Home Insurance Company
American Zurich Insurance Company

Aneco Insurance Co. of America, Inc.

Angelina Casualty Company

Archdale Mutual Insurance Co.

Argonaut Insurance Group

Argonaut-Midwest Insurance Company

Argonaut-Northwest Insurance Company

Argonaut-Southwest Insurance Company

Arkwright-Boston Insurance Company

Armed Forces Co-Operative Insuring Assn.

Armed Forces Ins. Exchange

Aspen Indemnity Corporation

Associated International Ins. Co.

Atlanta Casualty Company

Audubon Indemnity Company

Audubon Insurance Company

Auto Club Casualty Insurance Company

Auto Club Group Insurance Company

Auto Club Insurance Assn.

Auto Club Insurance Assn.

Auto-Owners Insurance Company

Automobile Club Insurance Company

Automobile Club Inter-Insurance Exchange

AVEMCO Insurance Company

BLC Insurance Company

Badger Mutual Insurance Company

Badger State Mutual Casualty Company

Bakers Insurance Company

Bankers Multiple Line Insurance Company

Bankers Mutual Insurance Company of D.C.

Belk Stores Insurance Reciprocal

Bellefonte Reinsurance Company

Bellefonte Underwriters Insurance Co.

Beneficial American Ins. Co., Ltd.

Brotherhood Mutual Insurance Company

Buffalo Reinsurance Company

Cal-Farm Insurance Company

California Cas. & Fire Ins. Co.

California Casualty Gen. Ins. Co.

California Casualty Indemnity Exchange

California Casualty Insurance Company

Cameron Mutual Insurance Company

The Camis Corp.

Canadian Universal Ins. Co., Inc.

Canadian Universal Ins. Co., Ltd.

Capital Enterprise Ins. Co.

Capital Landmark Insurance Company

Capitol Fire & Marine Insurance Company

Carolina Casualty Insurance Company

Carriers Insurance Company

Casualty Indemnity Exchange

Casualty Insurance Company

Casualty Reciprocal Exchange

Catholic Relief Ins. Co. of America

Celina Mutual Insurance Company

Centaur Insurance Company

Center Mutual Insurance Company

Central Lloyds

Central National Insurance Co. of Omaha

Champion Insurance Company

Chicago Insurance Company

Chicago Mutual Liability Company

Chrysler Insurance Company

CIM Insurance Corporation

Civil Service Employees Insurance Co.

Classified Insurance Corporation

Colonial Assurance Company

Colonial Insurance Co. of California

Colorado Farm Bureau Mutual Ins. Co.

Columbus Insurance Company

COMCO Insurance Company

Commercial Standard Insurance Company

Compac Insurance Company

Compass Insurance Company

Concord General Mutual Insurance Co.

Consumers Insurance Company

Cornhusker Casualty Company

Continental Divide Insurance Company

Continental Western Insurance Company

Cotton States Mutual Insurance Company

Country Casualty Insurance Company

Country Mutual Insurance Company

Covington Mutual Insurance Company

Credit General Insurance Company

Criterion Insurance Company

Crusader Insurance Company

Cumis Insurance Society, Inc.

Dairyland Insurance Company

John Deere Insurance Company

Delta Lloyds Insurance Co.

Dependable Insurance Company, Inc.

Developers Insurance Company

Diamond Guaranty Insurance Company

Diversified Insurers Company

Dixie Insurance Company

Donegal Mutual Insurance Company

Dover Insurance Company Limited

Early American Insurance Company

Early Settlers Insurance Company

Economical Mutual Insurance Company

Elite Insurance Company, U.S. Division

Elkhorn Insurance Company

Emmco Insurance Company

Emmco Insurance Co. of Delaware

Emmco Lloyds Insurance Company

Empire Fire and Marine Insurance Company

Empire Indemnity Insurance Company

Employee Benefits Insurance Company

Employers Reinsurance Corporation

Ennia Gen. Ins. Co. (US Branch)

Ensign Insurance Company

Equity Mutual Insurance Company

Erie Insurance Company

Erie Insurance Exchange

Essex Insurance Company

Evanston Insurance Company

Evanston Reinsurance Company

Excalibur Insurance Company

Exchange Mutual Insurance Company

Family Insurance Corporation

Farm Bureau General Ins. Co. of Michigan

Farm Bureau Mutual Ins. Co. of Ark., Inc.

Farm Bureau Mutual Ins. Co. of Idaho

Farm Bureau Mutual Insurance Co.—Iowa

Farm Bureau Mutual Insurance Co., Inc.

Farm Bureau Mutual Ins. Co. of Michigan

Farm Bureau Insurance Co. of Nebraska

Farm Bureau Town & Country Ins. Co. of Mo.

Farm Family Mutual Ins. Co.

Farmers and Merchants Insurance Company

Farmers Automobile Ins. Association

Farmers Mutual Hail Ins. Co. of Iowa

Farmers Mutual Ins. Co. of Nebraska

Farmers Reliance Insurance Co. of N.J.

Farmland Mutual Insurance Company

FB Insurance Company

Federal Kemper Insurance Company

Federated Guaranty Mutual Insurance Co.

Federated Rural Electric Ins. Corp.

Fidelity-Southern Insurance Company

Financial Indemnity Company
Fire Insurance Co. of Quaker City
First American Insurance Company
First of Georgia Insurance Company
First of Georgia Underwriters Company
First Security Insurance Company
Florida Farm Bureau Cas. Ins. Co.
Florida Farm Bureau Mutual Ins. Co.
Folksamerica Reinsurance Company
Foremost Insurance Company
Forum Insurance Company
Foundation Reserve Ins. Co., Inc.
Frankona Reinsurance Co. (U.S. Branch)
Gamut Indemnity Company
General Agents Ins. Co. of Amer., Inc.
General Casualty Company of Illinois
General Casualty Co. of Wisonsin
General Reinsurance Corporation
Georgia Farm Bureau Mutual Ins. Co.
Georgia Insurance Company
Germantown Mutual Insurance Co.
Gerling Global Reinsurance Corporation
Globe American Casualty Company
Goodville Mutual Casualty Company
Government Employees Insurance Company
Grange Insurance Association
Grange Mutual Casualty Company
Gray Insurance Company, The
Great Falls Insurance Company
Great Global Assurance Co.
Great Southwest Fire Insurance Company
Great West Casualty Company
Green Mountain Insurance Co., Inc.
Grinnell Mutual Reinsurance Co.
Guarantee Insurance Company
Guaranty Insurance Company
Guaranty National Insurance Company
Hallmark Insurance Company, Inc.
Hamilton Insurance Company
Harbor Insurance Company
Harco National Insurance Company
Harleysville Mutual Insurance Company
Heart of America Fire & Casualty Undrts.
Herald Fire Insurance Company

Heritage Mutual Insurance Company

Home Mutual Insurance Company

Home-Owners Mutual Insurance Company

Hoosier Insurance Company

Houston General Insurance Company

Huron Insurance Company

Ideal Mutual Insurance Company

IGF Insurance Company

Illinois Founders Insurance Company

Implement Dealers Mutual Insurance Co.

IMT Insurance Company

Independent Indemnity Company

Independent Fire Insurance Co.

Inland Insurance Company

Inland Mutual Insurance Company

Insurance Company of Evanston

Insurance Company of Florida

Integrity Mutual Insurance Company

Integon General Insurance Corporation

Integon Indemnity Corporation

Inter-Insurance Exch Chgo Motor Club

International Fidelity Insurance Co.

The International Insurance Co.

Interstate Fire and Casualty Company

Interstate Indemnity Company

Iowa American Ins. Co.

Iowa Mutual Insurance Company

Island Insurance Company Ltd

Kansas Fire and Casualty Company

Kentucky Central Insurance Company

Kentucky National Insurance Company

Kentucky Farm Bureau Mutual Ins. Co.

Kentucky Insurance Company

Keystone Insurance Company

KFB Insurance Company, Inc.

Kingsley International Ins., Ltd.

Lake States Mutual Insurance Company

Lakeland Fire & Casualty Co.

Landmark American Ins. Co.

Le Mars Mutual Insurance Co. of Iowa

Liberty National Fire Insurance Co.

Lincoln General Insurance Company

Lincoln Insurance Company

Lincoln Mutual Casualty Company

Lincoln National Reinsurance Co.

Lloyds of New Mexico Insurance Company

Lloyds, New York

London & American Insurance Company

Louisiana Farm Bur. Cas. Ins. Co.

Louisiana Farm Bureau Mutual Ins. Co.

Lutheran Benevolent Insurance Exchange

Madison Mutual Insurance Company

Mead Reinsurance Corporation

Members Insurance Company —Texas

Members Mutual Insurance Company

Members Service Insurance Company

Memphis Fire Insurance Company

Mercantile & Gen Reins Co of America

Merchants Bonding Company —Mutual

Meridian Mutual Insurance Company

Meridian Standard Insurance Company

Merit Insurance Company

MGIC Indemnity Corporation

Michigan Educational Employees Mut. Ins.

MIC General Insurance Corporation

MIC Property & Casualty Ins. Corp.

Mid-America Preferred Ins. Co.

Mid-Continent Casualty Company

Mid-Continent Insurance Company

Midland Insurance Company

Midland Prop. & Cas. Ins. Co.

Midwest Mutual Insurance Company

Midwestern Indemnity Company

Midwestern National Ins. Corp.

Milwaukee Guardian Insurance Inc.

Milwaukee Mutual Insurance Company

Milwaukee Safeguard Ins. Co.

Minnehoma Insurance Company

Mississippi Farm Bur. Mut. Ins. Co.

Montgomery Ward Insurance Company

Money Reinsurance Corp

Morrison Assurance Co., Inc.

Mortgage Guaranty Insurance Corp.

Motor Club of America Insurance Company

Motor Club Insurance Association

Motor Club of Iowa Insurance Company

Motorists Mutual Insurance Company

Motors Insurance Corporation

Mt. Vernon Fire Insurance Co.

Mountain West Farm Bureau Mutual Ins. Co.

Munich American Reinsurance Co.

Mutual Benefit Insurance Company

National American Ins. Co. of New York

Nassau Insurance Company

National Chiropractic Mutual Ins. Co.

National Excess Insurance Company

National Farmers Union Prop. & Cas. Co.

National Farmers Union Standard Ins. Co.

National Fire & Marine Insurance Company

National General Insurance Company—Miss.

National General Insurance Company—Mo.

National Idemnity Company

National Insurance Underwriters

National Investors Fire & Cas. Ins. Co.

National Mutual Insurance Company

National Property Owners Insurance Co.

National Reinsurance Corporation

National Trust Fire Insurance Company

Nationwide General Insurance Company

Nationwide Mutual Fire Insurance Company

Nationwide Mutual Insurance Company

Nationwide Property & Casualty Ins. Co.

New South Insurance Company

Nodak Mutual Insurance Company

North American Co. for Prop. & Cas. Ins.

North American Reinsurance Corp.

North American Lloyds of Texas

Northbrook Excess & Surplus Ins. Co.

Northbrook Indemnity Company

Northbrook Natl. Ins. Co.

Northbrook Property & Cas. Ins. Co.

North Carolina Farm Bur. Mut. Ins. Co.

North East Insurance Company

Northfield Insurance Company

North Pacific Insurance Company

Northland Insurance Company

Northland Casualty Company

Northwest Farm Bureau Insurance Company

North-West Insurance Company

NWNL General Insurance Company

NWNL Reinsurance Company

Occidental Fire and Casualty Co. of N.C.

Ohio Farmers Insurance Company

Ohio Hardware Mutual Insurance Company

Ohio Reinsurance Corp.

Oklahoma Farm Bur. Mut. Ins. Co.

The Oklahoma Surety Company

Old Dominion Insurance Co.

Old General Insurance Company

Omaha Indemnity Company

Omega Insurance Company

Oregon Automobile Insurance Company

Oregon Mutual Insurance Company

Ormond Reinsurance Company

Owners Insurance Company

Pacific Insurance Company

Pacific Marine Insurance Company

Paxton National Insurance Company

Pekin Insurance Company

Peninsula Insurance Company

Peninsular Fire Insurance Company

JC Penney Cas. Ins. Co.

Personal Service Insurance Company

Petroleum Casualty Company

Pine Top Insurance Company

Prairie States Fire Insurance Company

Preferred Risk Mutual Insurance Company

Presidio Insurance Company

Professional Mutual Insurance Company

Professional Underwriters Insurance Co.

Progressive Casualty Insurance Company

Property Owners Insurance Company

Protective Casualty Insurance Company

Protective Fire & Casualty Company

Protective Insurance Company

Protective National Insurance Company

Providers Insurance Company

Prudential Assurance Company, Ltd.

Puritan Insurance Company

Ranger Insurance Company

Ranger Lloyds

Reciprocal Exchange

Redwood Fire & Casualty Insurance Co.

Regent Insurance Company

Republic Mutual Insurance Company

Regis Insurance Company

Reinsurance Company of America, Inc.

Reliable Insurance Company

Resolute Reinsurance Company

Rhineland Rein. Corp. of America, Inc.

Rider Insurance Company

RLI Insurance Company

Rochdale Insurance Company

Rockford Mutual Insurance Company

Rocky Mountain Fire & Casualty Company

Rural Mutual Insurance Company

Safety Insurance Company

Save-T-Risk Insurance Company

Scor Reinsurance Company

Secured Insurance Corporation

Select Risk Mutual Fire Ins. Co.

Sheffield Insurance Company

Shelter General Insurance Company

Shelter Mutual Insurance Company

Shield Insurance Company

Simcoe & Erie General Insurance Co.

Signet Reinsurance Company

Skandia America Reinsurance Corp.

South Carolina Farm Bur. Mut. Ins. Co.

South Dakota Farm Bureau Mutual Ins. Co.

Southeast Title & Insurance Company

Southern Farm Bureau Casualty Ins. Co.

Southern Casualty Insurance Company

Southern Guaranty Insurance Company

Southern Home Insurance Company

Southern States Insurance Exchange

Southern Trust Insurance Company

Southwestern Insurance Company

Southwestern National Insurance Company

Standard Fire Insurance Co. of Alabama

Standard Guaranty Insurance Company

Standard Mutual Insurance Company

State Automobile & Casualty Underwriters

State Automobile Insurance Association

State Automobile Mutual Insurance Co.

State Mutual Insurance Company

State Security Ins. Co.

Statesman Insurance Company

Stonewall Casualty Company

Stonewall Insurance Company

Summit Fidelity and Surety Company

Surplus Underwriters Casualty Ins. Co.

Sutter Insurance Company

Tennessee Farmers Mutual Insurance Co.

Texas Farm Bureau Mutual Ins. Co.

Texas Farm Bureau Underwriters

Texas United Insurance Co.

Thomas Jefferson Insurance Company

Thurston Fire and Casualty Ins. Co.

Tico Insurance Company

Tower Insurance Company, Inc.

Town & Country Fire & Cas. Ins. Co., Inc.

Town & Country Insurance Company

Traders & General Insurance Company

Tradewind Insurance Company Ltd.

Transamerica Countrywide Ins. Co.

Transamerica Indemnity Company

Transamerica Ins. of Michigan

Transamerica Insurance Co. of New York

Transamerica Ins. Co. of Texas

Transamerica Ins. Corp. of America

Transatlantic Reinsurance Company

Transamerica Insurance Company

Transamerica Premier Insurance Company

Transit Casualty Company

Transport Indemnity Company

Transport Insurance Company

Twentieth Century Insurance Company

Union Indemnity Ins. Co. of New York

Union Insurance Company

Union Standard Insurance Company

Union International Ins. Co. Limited

United Community Ins. Co.

United Equitable Casualty Company

United Equitable Insurance Company

United Farm Bureau Mutual Insurance Co.

United Fire Insurance Company

United National Insurance Company

United Services Automobile Association

United States Liability Ins. Co.

Universal Casualty Ins. Co.

Universal Insurance Company

Universal Underwriters Insurance Company

Universal Underwriters Lloyds

Universal Underwriter of Texas

USAA General Indemnity Co.

Utah Farm Bureau Mutal Ins. Com.

Vermont Accident Ins. Co., Inc.

Verex Corporation

Vernon Fire and Casualty Insurance Co.

Viking Insurance Company of Wisconsin

Virginia Farm Bur. Mut. Ins. Co.

Virginia Mutual Insurance Company

Virginia Surety Company

Voyager Casualty Insurance Company

Wausau Underwriters Ins. Co.

Wawanesa Mutual Insurance Company

Wesco Insurance Company

West Bend Mutual Insurance Company

Western Community Ins. Co.

Western Carriers Insurance Exchange

Westfield Insurance Company

Westfield National Insurance Company

Western Agricultural Insurance Co.

Western Farm Bur. Mut. Ins. Co.

Western Lloyds Insurance Company

Western Preferred Casualty Company

Western World Insurance Co., Inc.

Westmoreland Casualty Company

Wilshire Insurance Company

Wisconsin Employers Insurance Group

Workmen's Auto Insurance Company

Worldwide Underwriters Insurance Company

Yosemite Insurance Company

Zale Indemnity Company

Zurich American Insurance Co. of Ill.

Zurich Insurance Company

Zurich Reinsurance Company of New York